

DEC 28 1989

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In The
Supreme Court of the United States
October Term, 1989

IN RE: HOLYWELL CORPORATION, et al.

Debtors

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION, HOLYWELL CORPORATION,
CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

FRED STANTON SMITH, individually and as
Trustee of the MIAMI CENTER LIQUIDATING TRUST,
THE BANK OF NEW YORK, THE CITY NATIONAL
BANK OF MIAMI, as Trustee under Land Trust
#5008793, M.C. HOLDING PARTNERS,
a New York General Partnership, and its
General Partners, namely, ROBANK CORPORATION,
H.D. LIQUIDATING, INC., ZENTAC INVESTMENTS,
INC., BOTT FLORIDA HOLDING CORPORATION,
AMERICAN SECURITY LTD., and
M. CENTER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT,
THE BANK OF NEW YORK

VANCE E. SALTER, Esq.
COLL DAVIDSON CARTER SMITH
SALTER & BARKETT, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

[Counsel of Record]

Of Counsel:

THOMAS F. NOONE, Esq.
ERNEST MARVIN & MARTIN
48 Wall Street
New York, New York 10286
Tel: (212) 422-2974

S. HARVEY ZIEGLER, Esq.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 374-8112

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ISSUES PRESENTED

- I. Does this Court lack jurisdiction?
- II. Did the lower court correctly affirm the removal and dismissal of the Petitioners' unauthorized and collateral attack on a confirmed and substantially consummated plan of reorganization?

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INTRODUCTION

The Petitioners are five affiliated debtors in consolidated proceedings who have presented their never-ending,

frivolous, Guinness Book of World Records claims and arguments over the past four years to:

Two different bankruptcy judges;

Ten different district court judges in over 50 separate appeals; and

Eight judges of the United States Court of Appeals in 14 separate appeals and a petition for writs of prohibition and mandamus.

These Petitioners have twice previously filed petitions for writ of certiorari in this Court and also filed a petition for writ of mandamus here. On all three occasions, this Court denied these petitions.¹

Currently, pending before this Court is another petition for writ of certiorari which was filed only on behalf of the Petitioner, Miami Center Limited Partnership.² The Bank of New York's brief in opposition in that case (filed December 1, 1989) was not even out the door when it received this Petition. On December 6, 1989, the Petitioners served yet another petition for writ of certiorari.³

¹ Case Nos. 88-80, 87-1988 and 87-1989. References to the Petitioners' appendix will be denoted as "___a," and references to the appendix to this Response are denoted "App. ___."

² Case No. 89-708.

³ Case No. 89-917.

STATEMENT OF THE CASE

Just as the Eleventh Circuit and the district court before it have come to know the underlying facts of this case, so too this Court is becoming all too familiar with these Petitioners and their frivolous, repetitive pleadings.

The five affiliated debtors--Theodore Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin")--all filed voluntary petitions in bankruptcy on August 22, 1984. The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.⁴ Gould owned 100% of the stock of fellow debtor Holywell, and also served as president and sole director of Holywell. In turn, Holywell owned 100% of the stock of debtor MCC, and Gould served as president and sole director of MCC. Gould and MCC were the sole general partners of debtor Chopin, and of debtor MCLP. All five debtors⁵ were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami.

⁴ Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and the inter-debtor obligations are eliminated.

⁵ For the purposes of this Response, the Petitioners will also be referred to as the "debtors."

Respondent, The Bank of New York (the "Bank")⁶ was the lead construction lender for the Miami Center Project. The Bank obtained a final judgment establishing the amount of its mortgage lien at over \$234 million as of March, 1985. The Bank proposed a plan of reorganization (the "Plan") that all classes of unaffiliated creditors overwhelmingly accepted but the Petitioners opposed. On August 12, 1985, the bankruptcy court appointed the Respondent, Fred Stanton Smith, to serve as the Liquidating Trustee as provided for under the confirmed Plan. [45a].

⁶ Pursuant to Supreme Court Rule 28.1, the following is a listing of the relationships of the Bank of New York:

(a) Parent of the Bank--The Bank of New York Company, Inc.

(b) "Affiliates" of The Bank are:

BNY Holdings (Delaware) Corporation
 The Bank of New York (Delaware)
 The Bank of New York Overseas Finance, N.V.
 Affinity Group Marketing, Inc.
 ARCS Mortgage Corp. (Fla.)
 ARCS Mortgage, Inc. (Calif.)
 BNY Leasing, Inc.
 Eastern Trust Company
 The Bank of New York Life Insurance Co., Inc.
 Capital Trust Company
 BNY Financial Corporation
 BNY Personal Brokerage, Inc.
 Beacon Capital Management
 The Bank of New York Trust Company, Inc.
 The Bank of New York Trust Company of California
 The Bank of New York Trust Company of Florida, N.A.
 Leonard Newman Agency, L.P.

The confirmed Plan⁷ provides in material part:

(1) *Liquidating Trust*. All of the property of the debtors became part of the "Miami Center Liquidating Trust" to be administered by the Liquidating Trustee. Assets were to be sold and the proceeds used to pay creditors in order of priority, with any residual funds or assets to be turned back over to the debtors.

(2) *Liquidating Trustee*. The Liquidating Trustee is not liable for any act done in good faith and in the exercise of his best judgment, but instead only for gross negligence, willful default, or misconduct. The Plan further provides:

No recourse shall ever be had, directly or indirectly against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are [sic] employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

(3) *Duty to Cooperate*. The debtors are required to assist the Bank and the Trustee in performing and implementing the Plan.

(4) *Retention of Jurisdiction*. The bankruptcy court retains jurisdiction after confirmation "until all payments and distributions called for under the Plan have been made and until the entry of final decree," over claims and "to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases." To date, the

⁷ Excerpts of the material provisions of the Plan are contained in App. 1.

bankruptcy court has not entered a final decree closing the bankruptcy cases under 11 U.S.C. § 350 and Bankruptcy Rule 3022.

The debtors failed to obtain a stay pending review of the confirmation order. Thus, on October 10, 1985, the Liquidating Trustee began implementing the Plan in accordance with its expressed terms.

Under the Plan, the Bank's designee (the "Purchaser"), which was a partnership comprised of affiliates of the Bank and the participating lenders, bought the Miami Center Project for its MAI-appraised value of \$255.6 million. The Bank paid that amount by paying approximately \$13 million in new cash over and above the judgment lien on the mortgages held by the Bank (that lien, with interest, was over \$242 million by October, 1985). In addition, the Bank released approximately \$30 million of cash collateral (which was used to pay hundreds of creditors pursuant to the Plan). All of the debtors' property became property of the "Miami Center Liquidating Trust," which then sold the Miami Center Project to the Purchaser in accordance with the terms of the Plan.

The district court affirmed the confirmation order, *Holywell Corp. v. The Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), and the Eleventh Circuit dismissed the debtors' appeal as moot, finding that "the plan had been substantially consummated and that . . . it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988). This

Court denied the Petitioners' petition for writ of certiorari from the Eleventh Circuit's order dismissing their appeal as moot. *Miami Center Ltd. Partnership v. Bank of New York*, 109 S. Ct. 69 (1988).

After the debtors failed in their attempts to attack the Plan by direct appeals, they commenced a new wave of collateral attacks. In August of 1987, debtors, Gould and Holywell, commenced a lawsuit in the name of Holywell's wholly-owned, non-debtor subsidiary, Twin Development Corporation, against the Bank and the Trustee in the Western District of Virginia. The district court in Virginia entered summary judgment in favor of the Bank and the Trustee and against Twin Development Corporation. [App. 11]. The Fourth Circuit dismissed Twin Development Corporation's appeal. [App. 12].⁸

The Petitioners filed yet another collateral attack when they filed the state court action that is at issue here. On October 15, 1987, the Petitioners filed in Dade County Circuit Court a complaint [27a] against the Respondents seeking compensatory and punitive damages in excess of \$140 million and other relief for various alleged acts and omissions in connection with the bankruptcy proceedings.

The allegations in the complaint accused the Respondents of:

⁸ The bankruptcy court entered its order of certification of contempt as to Gould and Holywell for the improper filing of the lawsuit in the Western District of Virginia. [App. 14]. Proceedings on this contempt certification are currently pending before the district court.

(1) *Negligence* (Count I). The complaint claimed that the Liquidating Trustee appointed by the bankruptcy court pursuant to the confirmed Plan acted negligently in performing his duties under the Plan.

(2) *Breach of Fiduciary Duty* (Count II). The Petitioners alleged that the Liquidating Trustee appointed by the bankruptcy court under the Plan breached his fiduciary duty to the debtors.

(3) *Discharge of Trustee* (Count III). The Petitioners asked the state court judge to discharge the Liquidating Trustee, who pursuant to the confirmed Plan was appointed by the United States Bankruptcy Judge.

(4) *Breach of Contract* (Count IV). The Petitioners alleged that the Respondents failed to "act fairly and to engage in a good faith effort to comply with the terms of the plan."

(5) *Conversion* (Count V). The Petitioners alleged that the Bank had wrongfully retained money belonging to the Liquidating Trust.

Pursuant to 28 U.S.C. § 1452 and Bankruptcy Rule 9027, the Respondents filed a timely application for removal of the state court action to the bankruptcy court. The debtors moved for remand. On December 15, 1987, the bankruptcy court heard argument on the application for removal and motion for remand. At the hearing, Petitioners' counsel advised the bankruptcy court:

Quite candidly, if Your Honor, consistent with your prior rulings, finds that the provisions in the plan confer jurisdiction over these types of proceedings, which we argue the plan cannot

properly do, then I believe that it determines the issues raised in the removal and the remand.

[App. 24-25]. The bankruptcy court found that the issues were "core" matters under 28 U.S.C. § 157 and recommended that the district court certify the petition for removal and deny the debtors' motion for remand. [24-25a]. The debtors filed objections to the bankruptcy court's report, but the district court affirmed and adopted the bankruptcy court's report and recommendations. [22a].

Thereafter, the Respondents⁹ moved to dismiss the removed state court action based on the grounds that: (1) the complaint failed to state a legally-sufficient claim against Fred Stanton Smith, individually, and (2) the bankruptcy court had determined or was in the process of determining all of the claims that the Petitioners had asserted in their complaint. [App. 30].

On May 12, 1988, the bankruptcy court granted the motions to dismiss, and held, in part:

1. . . . The complaint contains no sufficient allegations that Fred Stanton Smith was guilty of gross negligence, willful default or misconduct, as provided [by the Plan]. Such allegations are required to establish individual liability under the terms of the Plan.
2. . . . [A]ll matters contained in the Adversary Complaint have either been resolved by this

⁹ All of the Respondents other than Fred Stanton Smith, the Liquidating Trustee, are entities with interests identical to those of the Bank. Accordingly, all Respondents other than the Liquidating Trustee, (nine in all) will rely upon this brief in opposition.

Court in other pending adversary complaints or motions which were heard before the Court (and which rulings are presently on appeal) or are the subject of pending adversary proceedings or motions and which will be resolved in ordinary course.

3. The motion to dismiss of the Bank of New York is granted upon the same grounds as stated above concerning the motion to dismiss of Fred Stanton Smith as Liquidating Trustee of the Miami Center Liquidating Trust.

[19-21a].

The Petitioners appealed the bankruptcy court's order of dismissal to the district court. The district court affirmed the order of dismissal. [7a]. The Petitioners then appealed to the Eleventh Circuit. The Eleventh Circuit affirmed. [5a].

ARGUMENTS AGAINST GRANTING THE WRIT

Through the commencement over the past four years of over 60 appeals from bankruptcy and district court orders and six petitions for review by this Court, the Petitioners have ignored prior rulings and have attempted to systematically dismantle the confirmed and substantially consummated Plan. This Court and all of the courts below it have denied these frivolous attempts.

These Petitioners, having exhausted their direct attacks on the Plan have now sought to collaterally attack the Plan and the Liquidating Trustee's implementation of the Plan. This Court should not tolerate this blatant attempt to circumvent the bankruptcy and district court's orders.

The bankruptcy court's factual findings as to (1) the existence of "core" matters, (2) the controlling provisions of the confirmed Plan, and (3) the pendency of the identical claims raised in the complaint in other proceedings already ruled upon or yet to be ruled upon by the bankruptcy court, are subject to the "clearly erroneous" standard as given "strict application." Bankr. R. 8013; Fed. R. Civ. P. 52; *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985); *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982).

I.

LACK OF JURISDICTION

A. *The Petition is Moot*

The Petitioners are again clamoring for the return of something the Bank specifically bargained for in the Plan. This Court has previously denied the debtors' petition for writ of certiorari from the Eleventh Circuit's opinion below that the debtors' appeals are moot. *Miami Center Ltd. Partnership v. Bank of New York*, 109 S. Ct. 69 (1988).¹⁰

Petitioners argue that the duty of care imposed by the Plan is inconsistent with the common law standard

¹⁰ This Court has consistently denied certiorari jurisdiction where the court below held that the action, in whole or in part, was moot. See, e.g., *United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401 (3d Cir.), cert. denied, No. 88-2085 (Nov. 6, 1989) (WESTLAW WL 115098); *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir.), cert. denied, 110 S. Ct. 60 (1989); *Tyler v. Black*, 865 F.2d 181 (8th Cir.), cert. denied, 109 S. Ct. 1760 (1989); *Spears v. Thigpen*, 846 F.2d 1327 (11th Cir. 1988), cert. denied, 109 S. Ct. 876 (1989); *SunTek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179 (Fed. Cir. 1988), cert. denied, 109 S. Ct. 793 (1989).

and consequently the Liquidating Trustee's acts in implementing the Plan were violations of his duty to the Petitioners. (Petition, pp. 16-24). Moreover, Petitioners' complaint seeks relief that would materially alter the terms of the Plan by (1) increasing the purchase price to be paid for the Miami Center Project by the Bank or its designee, (b) imposing additional duties upon the Liquidating Trustee appointed pursuant to the terms of the Plan, and (c) altering the payment-by-class priorities established by the Plan. The Petitioners' failure to obtain a stay pending review of the confirmation order moots any objections they have regarding the duty of care standard imposed by the Plan, any objections they have regarding the obligations imposed on the Liquidating Trustee under the confirmed Plan, or any objections they have regarding the terms of the Plan.

This Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has been substantially consummated. *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation the mootness doctrine promotes an important policy of bankruptcy law--that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

**B. *The Petitioners Have Failed To Establish
An Appropriate Basis For This Court's
Certiorari Jurisdiction***

The Petitioners attempt to argue that this Court has jurisdiction by virtue of (1) the constitutional limits of authority of United States District Courts and Bankruptcy Courts, (Petition, pp. 10-13), (2) the existence of a conflict between the Eleventh and First Circuit Court of Appeals as to abstention (Petition, pp. 14-15), and (3) the violation of the Petitioners' constitutional right to a jury trial. (Petition, pp. 25-27). Notwithstanding the Petitioners' far reaching attempts to manufacture a basis for this Court's jurisdiction, it is apparent (as outlined in more detail below) that there is no conflict or important question of federal law to be resolved by this Court. Sup. Ct. R. 17.1. Rather, the Petitioners, not satisfied with two or even three bites of the same apple, are now seeking this Court's review as a form of further collateral attack.

II.

**THE LOWER COURT CORRECTLY AFFIRMED THE
REMOVAL AND DISMISSAL OF THE PETITIONERS'
UNAUTHORIZED AND COLLATERAL STATE COURT
ATTACK ON THE PLAN**

The Petitioners' arguments concerning the bankruptcy court's jurisdiction overlook clear statutory authority to the contrary. Further, the Petitioners turn a blind eye to the provisions of the confirmed Plan and the proceedings over the past four years that have included well over 60 appeals from bankruptcy and district court orders. In fact, all of the acts about which the debtors complain are the subject of: (1) prior court orders, (2)

court orders that, at the time of the Petitioners' complaint, were on appeal, or (3) matters that, at the time of the Petitioners' complaint, were pending before the bankruptcy court as an adversary proceeding or motion. Further, the Petitioners' colorful claims of a purported violation of the Seventh Amendment is nothing more than a ploy to seek this Court's jurisdiction. The Petitioners, having submitted themselves to the bankruptcy court's jurisdiction, do not have a right to a jury trial in a "core" proceeding. This is certainly true where the bankruptcy court dismissed the action before trial.

*A. The Issues Raised In The State Court
Action Are "Core" Matters*

Despite the Petitioners' thinly-veiled attempts to couch their complaint to the contrary, the state court action is inextricably linked to, and entirely based upon, the confirmed Plan. The subject matter of the state court action raises various issues concerning "the administration of the estates," "allowance or disallowance of claims," "orders approv[ing] the use or lease of property," "orders approv[ing] the sale of property," and "the liquidation of assets of the estate." Each of these issues is a "core" matter which, pursuant to 28 U.S.C. § 157 (b)(2)(A), (B), (M)-(O), comes within the bankruptcy court's jurisdiction.

Essentially, the Petitioners argue that the labels alone placed on the counts raised in the state court action entitle them to pursue their collateral attack in the state court. (Petition, pp. 15-16). Saying it is so, however, will not make it true. Consequently, the bankruptcy court

appropriately examined the allegations raised in the state court action in light of the pending bankruptcy proceedings. The bankruptcy court thus determined that the matters raised in the state court action are "core" matters relating to the implementation and administration of the confirmed Plan. [25a].

Moreover, the mere fact that a claim involves state law, in whole or in part, does not preclude the bankruptcy court from determining the claim. Rather, the bankruptcy court must determine the nexus or overall relationship between a particular claim and the bankruptcy proceeding. The court in *Harley Hotels, Inc. v. Rain's Internat'l, Ltd.*, 57 Bankr. 773, 780 (M.D. Pa. 1985) noted that courts in analyzing the cases before them have articulated various ways of determining that a proceeding is a "core" matter:

These include that the claim in question is "so logically connected" to an issue in the bankruptcy case "that judicial economy and fairness dictate they be decided in the same forum". *In re: Lombard-Wall, Inc.*, 48 B.R. 986, 991 (S.D.N.Y. 1985) (debtor's claims against creditors were core proceeding under § 157 (b)(2)(C)). If the claim is "intimately connected with the property of the estate", then it may be a core proceeding despite the fact that its resolution would require an adjudication based on state law. *Macon Prestressed Concrete Co. v. Duke*, 46 B.R. 727, 729-30 (M.D. Ga. 1985). See also § 157(b)(3) ("the determination that the proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state law"). In general, if there is a sufficient "nexus between the proceeding involving a state law cause of action and the bankruptcy estate", then the proceeding may be considered 'core'. *In re: Lion Capital Group*, 46

B.R. 850, 856 (B. Ct. S.D.N.Y. 1985). "That Congress has redrawn the bankruptcy courts as adjunct courts subject to considerable control by Article III courts . . . speaks strongly in favor of a broad definition of core proceedings". *Lion Capital*, 46 B.R. at 859.

(emphasis added).

In this case, the courts below recognized that this "nexus" exists. The connection between the allegations made in the complaint and the administration of the bankruptcy proceedings provides the basis for the lower court's finding that the issues raised in the complaint are "core" matters. All of the claims in the state court action, "relate directly to the restructuring of the relationships between a debtor and its creditors, which is at the core of the federal bankruptcy power." *In re Mankin*, 823 F.2d 1296, 1309 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1468 (1988).

The Petitioners alleged in the state court action that the bankruptcy estates and Liquidating Trust were mal-administered. Such claims "concern the administration of the estate" and are therefore "core" proceedings under 28 U.S.C. § 157(b)(2)(A). The claim for additional sales proceeds in connection with the sale of the Miami Center Project pursuant to the Plan also involves an, "order approving the sale of property." 28 U.S.C. § 157(b)(2)(N). All of the claims in the state court complaint relate to, "the liquidation of the assets of the estate." 28 U.S.C. § 157(b)(2)(O). Further, the Liquidating Trustee's defenses to the complaint are based on the scope of his duties and responsibilities outlined in the confirmed Plan. Resolution of a dispute as to a trustee's duties are certainly a

"core" matter. Accordingly, the bankruptcy court was empowered to hear even state law claims if, as here, such claims fall within the categories established in 28 U.S.C. § 157(b)(2). *In re I. A. Durbin, Inc.*, 62 Bankr. 139, 143 (S.D. Fla. 1986).

The Petitioners not only are misplaced in their reliance on *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1986) as establishing a conflict, but they flagrantly miscite the holding in *Arnold*. (Petition, pp. 14-15). The court in *Arnold* determined that the state court proceeding before it was a "core" matter within the bankruptcy court's jurisdiction. Further, the court held that abstention, pursuant to 28 U.S.C. § 1334(c)(1), would be unwarranted. *Id.* at 171.

B. *The Petitioners' Complaint Is Subject To Prior Orders And Pending Bankruptcy Proceedings*

The Petitioners neglect to advise this Court that all of the issues raised in their complaint are the subject of (1) prior court orders, (2) court orders that, at the time of the complaint were on appeal, or (3) matters that, at the time of the complaint were pending before the bankruptcy proceeding as an adversary proceeding or motion. As a result, these court orders and proceedings bind these Petitioners and bar the subject complaint.

The thrust of the Petitioners' claims of liability against the Liquidating Trustee arise out of his actions in carrying out the confirmed Plan. The bankruptcy court found that it had resolved all of these same issues in other proceedings or that these issues would be resolved in pending proceedings. [20a]. The district court held

likewise and described in detail the prior orders and pending proceedings. [14-17a].

In fact the district court succinctly noted that the state court complaint was merely a collateral attack upon the confirmed Plan:

In the case *sub judice*, the allegations of misconduct refer not to "the field left to [the trustee's] discretion" but rather to duties that were required by the Confirmed Plan of Reorganization. The Appellants assert that the Plan established a minimum standard of care, and that the Trustee was still liable *under a common law duty* to a higher standard.

This argument overlooks the fact that the Appellants are not claiming that the Trustee breached his common law duty while acting within the provisions of the Plan, but rather that his actions under the Plan *themselves* breached his common law duty. Thus the two standards here are in direct conflict. The question is therefore not whether the Plan relieved the Trustee of his common law duty, but whether the duties required by the Plan were controlling.

. . . .

. . . [W]here the allegations contained in the Complaint involve duties required under the Plan, those duties control and the Trustee is relieved of personal liability for any conflicting duties under the common law.

[13-14a] (emphasis in original) (footnote omitted).

It is thus apparent that Petitioners have completely disregarded prior court orders and appellate decisions in filing the state court action and seeking this Court's review. This Court should not countenance this frivolous,

collateral attack on prior court decisions involving income tax liability, payment of post-petition interest to the Bank, MCJV's claims, inter-debtor loans, *ad valorem* taxes, and federal withholding taxes. [14-17a]. These decisions represent the law of the case and bar the Petitioners from relitigating these issues.

C. *The Petitioners Do Not Have A Right To A Jury Trial*

The Petitioners had no constitutional right to a jury trial with respect to the claims asserted in the state court action. Having submitted to the jurisdiction of the bankruptcy court, the Petitioners have no right to a jury trial as to "core" matters. This is especially true because the Petitioners' claims did not even survive a motion to dismiss. Thus, it is not necessary to even consider whether their claims should be tried to a jury.

This Court in *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989) did not decide whether a party having submitted itself to the jurisdiction of the bankruptcy court is entitled to a jury trial as to "core" matters. On the contrary, this Court cited *Katchen v. Landy*, 382 U.S. 323 (1966) for the proposition that a party which has submitted itself to the bankruptcy court's jurisdiction is not entitled to a jury trial. This Court analyzed its decision in *Katchen* as follows:

Our decision turned, rather, on the bankruptcy court's having "actual or constructive possession" of the bankruptcy estate, and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate.

Granfinanciera, 109 S. Ct. at 2798 (citations omitted). This Court further opined that "'when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity.'" *Id.* (quoting *Katchen*, 382 U.S. at 336).

There can be no doubt that these Petitioners submitted themselves to the bankruptcy court's jurisdiction when they filed voluntary petitions in bankruptcy. The Petitioners apparently seek the safe haven of the bankruptcy court when that is convenient, but seek to avoid the bankruptcy court's jurisdiction and attack its decisions collaterally when the court rules adversely to the Petitioners.

The Petitioners' protestations about a jury trial miss the point for another reason as well. A claimant must state a legally-sufficient claim that survives a motion to dismiss (or for summary judgment) before any right to a jury trial can be recognized.

In this instance, the bankruptcy court found that the claims set forth in the state court action had already been determined adversely to the debtors or were insufficient as a matter of law. [19a]. The district court painstakingly reviewed the bankruptcy court's analysis and agreed, in a ten-page opinion. [22a]. Further, as noted above, the claims in the state court action would also have been subject to dismissal upon grounds of mootness.

As a policy matter, it is vital that a debtor that has (a) voluntarily subjected itself to the bankruptcy court's jurisdiction by seeking the protection from creditors and "fresh start" available under the bankruptcy laws and (b) litigated and lost an issue in the bankruptcy court, cannot

re-assert those unsuccessful claims in a jury trial in a state court. That is precisely the kind of circumvention and duplicative judicial labor that the bankruptcy system is intended to avoid.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petitioners' petition for certiorari review.

Respectfully submitted,

S. HARVEY ZIEGLER, ESQ.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 374-8112

COLL DAVIDSON CARTER SMITH
SALTER & BARKETT, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

By: _____
Vance E. Salter

Of Counsel:

THOMAS F. NOONE, ESQ.
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10286
Tel: (212) 422-2974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ~~29th~~^{28th} day of December, 1989, a true and correct copy of the foregoing was mailed to:

ROBERT M. MUSSELMAN, ESQ.
MUSSELMAN & ASSOCIATES
413 Seventh Street, N.E.
Charlottesville, VA 22901
Tel: (804) 977-4500

THEODORE B. GOULD, *PRO SE*
2565-Ivy Road
Charlottesville, Va. 22901
Tel: (804) 295-7125

HERBERT STETTIN, ESQ.
2215 AmeriFirst Building
One Southeast Third Avenue
Miami, FL 33131
Tel: (305) 374-3353

By: _____
Vance E. Salter

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App. 1

UNITED STATES BANK-
RUPTCY COURT SOUTH-
ERN DISTRICT OF FLORIDA

CHAPTER 11 Proceedings

IN RE:	)	CASE NOS. 84-01590-
	)	BKC-TCB
HOLYWELL	)	84-01591-
CORPORATION, et. al.	)	BKC-TCB
	)	84-01592-
Debtors	)	BKC-TCB
	)	84-01593-
	)	BKC-TCB
	)	84-01594-
	)	BKC-TCB
)	

AMENDED CONSOLIDATED PLAN OF
REORGANIZATION PROPOSED
BY THE BANK OF NEW YORK

CONSOLIDATED
PLAN OF REORGANIZATION
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V. CREATION OF TRUST

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all

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existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate to effect the sale of Miami Center to BNY or its designee in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

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(j) Release, convey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or to preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from liability the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this Plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized

depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

4. In no case shall any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, or to any part or parts thereof, be obligated to see that the provisions of this Plan or the terms of the Trust have been complied with, or be obligated or privileged to inquire into the authority of the Trustee to act, or

to inquire into any other limitation or restriction of the power and authority of the Trustee, but as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the power of the Trustee to act or otherwise deal with said properties shall be absolute.

5. The Trustee shall receive reasonable compensation for his services subject to the approval of the Court which fee shall be a charge against and paid out of the Trust Property.

6. All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all such costs, expenses and obligations, shall approve and direct the payment thereof prior to a distribution to the holders of unsecured Allowed Claims.

7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in the exercise of his best judgment, nor shall the Trustee be liable in any event except

for his own gross negligence, willful default or misconduct.

9. The Trustee may resign at any time by giving written notice of his intention to do so addressed to the Court, and such resignation shall be effective upon the date provided in such notice.

10. In case of the resignation of the Trustee, a successor shall thereupon be appointed by an instrument in writing, signed and acknowledged (i) prior to the acquisition of Miami Center by BNY, by BNY and the Creditors' Committee and (ii) subsequent to the acquisition of Miami Center, by the Creditors Committees and delivered to the resigning Trustee, whereupon such resigning Trustee shall convey, transfer and set over to such successor in trust by appropriate instrument or instruments all of the Trust Property then in his possession and held hereunder. Said successor shall thereupon be vested with all the rights, privileges, powers and duties of the Trustee named herein. Each succeeding Trustee may in like manner resign, and another may in like manner be appointed in his place.

11. If BNY or the Creditors Committees at any time desire to terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee in his stead, BNY and the Creditors Committees may do so by a written instrument, addressed to such Trustee then acting; thereupon like conveyances as in the case of resignation of the Trustee shall be made by the Trustee then acting to the newly appointed Trustee, and such new Trustee shall be vested with all the rights, privileges, powers and duties of the Trustee herein named.

VIII. DUTIES OF THE DEBTORS

Commencing on the Effective Date and continuing thereafter, the Debtors shall devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the Plan and to comply from time to time with the reasonable requests of BNY, the Trustee and the Creditors Committees. Without limitation of the foregoing the Debtors shall,

(a) in connection with the sale and transfer of Miami Center as provided in Article IV hereof, take all actions requested by BNY, the Trustee or the Creditors Committees to promptly effectuate the sale thereof, including, without limitation, (i) grant BNY and its attorneys, agents, and accountants full and complete access to the books and records of the Debtors relating in any way to Miami Center and permit BNY to contact any tenants or prospective tenants in Miami Center in connection with the terms and conditions of their occupancy or their proposed occupancy, (ii) deliver to the Trustee, promptly after the Effective Date, all documents required to be delivered to BNY under the Contract of Sale, including but not limited to, all plans specifications, drawings, as built plans and surveys, plans, inventories of all personal property, operating manuals, licenses service and maintenance contracts, and warranties, (iii) take all steps, execute and deliver all documents, and supply all information necessary or appropriate to close the Contract of Sale and to effectuate a transfer of title to Miami Center as contemplated by Article IV hereof, and the Contract of Sale.

(b) In connection with the distribution to the creditors of the Washington Proceeds and the implementation of the Plan, take all action

and supply all information required of Debtors and/or requested by the Creditors Committees or the Trustee in connection with the prompt and timely prosecution of objections to claims filed against the estates, the prompt and speedy defense of litigation against the estates and the execution of all documents and the performance of all acts as may be necessary or desirable to promptly implement and effectuate the distribution to the creditors of the estates, other than Affiliated Creditors and the overall implementation of the Plan. The Debtors shall cooperate fully with the Trustee and Creditors Committees and shall grant to the Trustee and Creditors Committees access to and shall permit the Trustee and Creditors Committees to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody control of any of the Debtors regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan.

(c) Take any and all actions requested by BNY, the Trustee on the Creditors Committee which are deemed necessary or appropriate by BNY, the Trustee, or the Creditors Committee to implement and perform this Plan, whether or not specifically enumerated herein.

XIV. RETENTION OF JURISDICTION

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan had been made and until the entry of final decree, in respect to the following matters:

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(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK

By: /s/
Vice President

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

TWIN DEVELOPMENT CORP.,	)	CIVIL ACTION NO.
	)	87-0037-C
Plaintiff)	
	)	ORDER
v.)	
FRED STANTON SMITH,	)	JUDGE JAMES H.
BANK OF NEW YORK,	)	MICHAEL, JR.
and IRVING WOLFF,)	
)	
Defendants)	

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. That various applications for leave to file supplemental and additional authority shall be, and they hereby are, granted.

2. That the defendants' motion for summary judgment shall be, and it hereby is, granted.

3. That this action shall be, and it hereby is, dismissed and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge

15 November 1988
Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2623

Twin Development Corp.,

Plaintiff - Appellant,

v.

Fred Stanton Smith; Bank
of New York; Irving Wolff,

Defendants - Appellees.

Appeal from the United States District Court for the
Western District of Virginia, at Charlottesville. James H.
Michael, Jr., District Judge.

Upon consideration of appellant's motion for leave to
reply to the Bank of New York's answer,

IT IS ORDERED that the motion for leave to file a
reply is denied.

Upon consideration of the Bank of New York's
motion to dismiss this appeal and the responses thereto,
including other motions to dismiss,

IT IS ORDERED that the Bank of New York's motion
is granted, and this appeal is dismissed. In view of the
dismissal of the appeal, it is unnecessary to consider the
motions to stay.

Entered at the direction of Judge Russell, with the
concurrence of Chief Judge Ervin and Judge Hall.

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For the Court

/s/ John M. Greacen
CLERK

IN THE UNITED STATES
BANKRUPTCY COURT IN
AND FOR THE SOUTHERN
DISTRICT OF FLORIDA
CASE NO: 84-01590/91/92/93/94
BKC SMW

HOLYWELL
CORPORATION
Debtor

ORDER OF CERTIFICATION OF CONTEMPT

THIS CAUSE came on before the Court on January 21, 1988, upon Order Scheduling Hearing on Trustee's Motion for Contempt, dated December 22, 1987, and the Court, having considered the documents received into evidence, having heard argument of counsel, and being otherwise fully advised in the premises, makes the following findings of fact and certifications of contempt to the United States District Court for the Southern District of Florida.

1. Fred Stanton Smith is the duly appointed, qualified and acting Liquidating Trustee of the Miami Center Liquidating Trust, having been named on August 12, 1985, as provided in the Amended Consolidated Plan of Reorganization (The Plan).

2. The Plan provides in Article XIV for retention of jurisdiction by this Court after confirmation until all payments and distributions called for in the Plan have been made, and until the entry of a final decree. There are unpaid creditors remaining, and no final decree has been entered.

3. Article XIV of the Plan further provides for this Court to adjudicate all claims and controversies arising

during the pendency of the Chapter 11 cases, and for this Court to make any orders necessary or appropriate to carry out the provisions of the Plan.

4. Article V, Section 8 of the Plan states that the Liquidating Trustee shall not be liable individually for the performance of his duties as Trustee and that all liabilities of the Trustee shall only be enforceable against the Trust property.

5. In August 1987, Twin Development Corporation (Twin), a wholly owned subsidiary of Holywell Corporation, acting through Theodore B. Gould as its President, agent and sole director sued Fred Stanton Smith individually in the United States District Court for the Western District of Virginia for injunctive relief and money damages, alleging claims involving the Liquidating Trust and questions concerning the property and administration of the Trust by the Liquidating Trustee. This Court ordered Theodore B. Gould and Twin, its agents, employees and attorneys to cause the dismissal of that action without prejudice to the bringing of a proceeding before the bankruptcy court on any of the issues made.

6. Theodore B. Gould, as president of Twin, and Robert M. Musselman, as its attorney, did not cause the dismissal of that suit. Instead, acting through Theodore B. Gould and by its attorney, Robert M. Musselman, Twin filed a series of motions for dismissal of the Virginia proceeding and argued against the granting of its own motion.

7. Thereafter, on December 31, 1987, Theodore B. Gould, as president, agent and sole director of Twin,

wrote to Robert M. Musselman, as its attorney representing Twin in the Virginia suit, to withdraw Twin's motion to dismiss, and to oppose dismissal of the action in direct violation of this Court's previous Orders. The Virginia action has not been dismissed.

8. On October 15, 1987, each of the debtors in these proceedings, including Theodore B. Gould and Holywell, sued Fred Stanton Smith, both as Liquidating Trustee and individually in Dade County Circuit Court, alleging claims arising out of the administration of the Liquidating Trust and the performance of the Liquidating Trustee's duties. Robert M. Musselman and Theodore B. Gould signed the complaint.

9. By Order dated December 22, 1987, the Court scheduled a hearing on January 21, 1988, requiring Theodore B. Gould, Holywell Corporation and Robert M. Musselman to show cause why they should not be cited for contempt for these actions.

10. At the scheduled hearing, the Court heard and received evidence and argument of counsel. The following conclusions form the basis for the Court's determination that Theodore B. Gould, Holywell Corporation and its attorney Robert M. Musselman are in civil contempt of court, and should be appropriately punished by the United States District Court.

A. The Plan provides that this Court has post-confirmation authority over the debtors and the Plan assets (defined in Article V, Section 1 as "all property of the estates of the Debtors within the meaning of Section 541 (a) of the Code.) The Plan has been confirmed and that Order of Confirmation has been affirmed by the District

Court. An appeal from the District Court to the Eleventh Circuit has been dismissed as moot.

B. The filing of the suits in the United States District Court in Virginia and the Circuit Court in Dade County, Florida represent deliberate attempts by Theodore B. Gould and Holywell Corporation to interfere with the orderly administration of this Court of the Plan, the assets of the Liquidating Trust and the Trustee. The deliberate refusal to obey this Court's Orders concerning dismissal of the Virginia proceeding the filing of pleadings in the Virginia suit seeking to frustrate this Court's Order; and the subsequent filing of the Dade County suit represent willful attempts to subvert the authority of this Court. The letter of December 31, 1987, written by Theodore B. Gould, acknowledges his conscious decision not to obey the Orders of this Court.

C. The conduct of Robert M. Musselman in filing the pleadings referred to above is a willful disobedience of this Court's Orders directed to him.

D. The respondents have attempted to avoid responsibility for their actions by arguing that the Court's jurisdiction over the debtors and much of their property ended upon confirmation, and that, therefore, this Court had no authority to order the dismissal of the Virginia suit, or to punish them for filing the Dade County suit. The same arguments were made in a Petition for Mandamus and Prohibition filed by the debtors (through Robert M. Musselman) in the Eleventh Circuit. The Petition was denied by Order dated January 22, 1988.

E. The remedy of a party who disagrees with an order of this Court is by appeal to the District Court, and

to seek to stay the effect of the order sought to be reviewed, if appropriate. The debtors have sought review by appeal from the Court's prior orders relating to these matters. Those appeals pend under case numbers 87-2315 CIV TCS; and 88-0373 CIV KLR. No stay remains in effect since Judge Scott vacated a temporary stay by Order dated January 4, 1988.

F. No party nor any lawyer representing a party may deliberately ignore or act in contradiction of an Order of this Court simply because they do not agree with it. Such conduct is contumacious and is punishable by contempt. The validity of the Court's authority to carry out its responsibilities depends upon obeyal of its orders until reversed or stayed pending review.

G. As punishment, the Court believes it is appropriate to fine Mr. Musselman and to fine both Mr. Gould and Holywell Corporation, and to require a period of public service in Dade County, Florida, by Mr. Gould.

DONE AND ORDERED IN CHAMBERS, MIAMI, FLORIDA, THIS 7 DAY OF APRIL 1988.

SIDNEY M. WEAVER
UNITED STATES BANKRUPTCY
JUDGE

Conformed copies:
Herbert Stettin, Esquire
Thomas F. Noone, Esquire
Robert Mark, Esquire
Theodore B. Gould
S. Harvey Ziegler, Esquire
Robert Musselman, Esquire
John W. Kozyak, Esquire
Vance Salter, Esquire

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Judge Sidney M. Weaver

In the Matter of:

HOLYWELL CORPORATION, et
al.

Case No.84-01590-
BKC-SMW

Debtors.

MIAMI CENTER LIMITED, et al.
Plaintiffs,

Case No.87-0546-BKC-
SMWA

-vs-

BANK OF NEW YORK, et al.,
Defendants.

X

APPLICATION FOR REMOVAL OF CIVIL ACTION TO
THE BANKRUPTCY COURT PURSUANT TO 28 U.S.C.
SECTION 1452 AND BANKRUPTCY RULE 9027;
MOTION TO DISMISS PLAINTIFFS' COMPLAINT, FOR
SANCTIONS AND OTHER RELIEF; MOTION TO DIS-
MISS AND MOTION FOR SANCTIONS
and
MOTION FOR REMAND

The above-entitled cause came on for hearing before the
HONORABLE SIDNEY M. WEAVER, one of the Judges of
the UNITED STATES BANKRUPTCY COURT, in and for the
SOUTHERN DISTRICT OF FLORIDA, at 51 Southwest 1st
Avenue, Miami, Dade County, Florida, at a session of said
Court on Tuesday, December 15, 1987, commencing at or
about 9:30 a.m., and the following proceedings were had:

REPORTED BY: Jaclyn M. Ouellette

APPEARANCES:

STEARNS, WEAVER, MILLER, WEISSLER,
ALHADEFF & SITTERSON, by
ROBERT A. MARK, Esquire,
Attorneys for Corporate Debtors.

KIRKPATRICK & LOCKHART, by
S. HARVEY ZIEGLER, Esquire,
and
COLL, DAVISON, CARTER, SMITH, SALTER &
BARKETT, by
VANCE E. SALTER, Esquire,
Co-counsel for Bank of New York.

PAMELA STETTIN, Esquire,
Attorney for Fred Stanton Smith, Liquidating
Trustee.

ALSO PRESENT:

THEODORE B. GOULD, in proper person.

THE COURT Holywell.

Mr. Mark, I tried to get you on a conference call yesterday afternoon.

MR. MARK: I was still out of town and didn't get the message.

THE COURT: I understand that. I rendered a decision and the decisions are these.

Mr. Salter, you were privy to these with Mr. Stettin?

MR. SALTER: Yes, sir.

THE COURT: I did not discuss your particular case with these two gentlemen. There were two facets that I was to rule on by Monday and indeed I did.

As to the as is condition, this does not pertain to you although you are beneficiary indirectly.

As to the three categories relative to the closing statement, the Court found – and Mr. Stettin is drawing the order – that those three categories are not affected and the as is condition will prevail. Of course, that means that the residue will flow over to Mr. Gould.

As to the other one, the Court finds, and this is not the time to discuss it, just accept this decision, and I would ask Mr. Salter to draw the order, that this was not, not, undersecured.

All right. Now, that takes care of those two which I promised you yesterday and indeed did spend some weekend work making the determination, the Court's decision.

What do we have today?

MR. MARK: Judge, Mr. Ziegler has filed an application for removal which the Court had scheduled for hearing.

In that regard, the Debtors filed a motion for remand which technically may not be ripe until the removal is granted, but they both frame the same issues.

THE COURT: We can handle it.

MR. MARK: The other matters are motions to dismiss which may not be ripe depending upon the resolution of whether the Court hears this case or whether it winds up back in State Court.

In that regard, I would point out to the Court, I don't have my Code book with me but Mr. Ziegler I think has looked at it, that the decision on remand, I believe, is considered like the proposed findings of fact and conclusions of law in a noncore proceeding so that it goes up to the District Court on like a report and recommendation.

I have not discussed this yet with Mr. Ziegler but it would be my belief that if that was the case, then really any motions directed to the pleadings themselves ought to await a District Court determination on the motion for remand.

THE COURT: Excuse me just a minute.

Mr. Marshal, would you be kind enough to go down to the 341 Meetings and escort Mr. Bublick up here, who was scheduled for trial this morning?

THE MARSHAL: Yes, sir.

THE COURT: Go ahead.

MR. ZIEGLER: Your Honor, I think I agree with Mr. Mark and we can shorten this up.

THE COURT: All right.

MR. ZIEGLER: I think if the Court is disposed to grant the removal and there being a pending motion for remand which has been filed, there is no need to reset the motion for remand for another day.

THE COURT: We can simultaneously handle this.

MR. ZIEGLER: And then the Court's obligation under 9027, Rule 9027, provides that the Bankruptcy Court shall file a report and recommendation for disposition of the motion for remand. The Clerk shall serve a copy of the report and recommendation on the parties. Within ten days thereafter, the parties then state their objections to the report to the District Court, and that would take care of it, too.

I have no problem in holding off on the motion to dismiss.

THE COURT: There has been some changes in the law relative to the remand atmosphere.

MR. ZIEGLER: If the Court would like, I do have the Colliers section that covers the August 27th---

THE COURT: Let me just state my impression to citations from Colliers. I love the editors, I know them. They are one man's opinion, and I certainly take that in an advisory capacity.

MR. ZIEGLER: They quote the rule extensively and it's all in the rule. It's relatively simple.

THE COURT: I appreciate their thoughts and I shall take it as an advisory matter but certainly not the record.

--- All right. We have it over here. You have an application for removal; right?

MR. ZIEGLER: Yes, sir.

THE COURT: It is in the State Court now?

MR. ZIEGLER: Yes, sir.

THE COURT: Consistent with the Court's prior rulings that all matters should come before this Court, then the Court would consider this motion at this time.

Do you want to argue your motion now or is it self-evident?

MR. ZIEGLER: I think the motion speaks for itself and in fact some of the issues---

THE COURT: Is it consistent with my prior rulings?

MR. ZIEGLER: Yes, sir.

THE COURT: Mr. Mark, do you care to address that?

I will back off temporarily from my decision the other day, when I said don't question the jurisdiction of this Court anymore. For purposes of argument, go ahead.

MR. MARK: I wasn't sure I was going to make it to New York.

(Laughter)

MR. MARK: Judge, the issues are similar to the ones that have been raised, so I don't want to belabor the argument. There is a consideration I believe that the Court has to make as to whether this is a core or noncore proceeding.

Quite candidly, if Your Honor, consistent with your prior rulings, finds that the provisions in the plan confer jurisdiction over these types of proceedings, which we argue the plan can not properly do so, then I believe that

it determines the issues raised in the removal and the remand.

If it's a noncore proceeding, as we argued, then there are issues which are alternatively raised in the motion for remand, suggesting that it is not efficient to have a non-core proceeding tried in this Court which will then have to go back to the District Court for trial de novo, so if you were to reconsider and find that this is a noncore proceeding, then we would strongly urge that the Court allow the matter to stay in State Court instead of being tried twice.

THE COURT: Give me the benefit of the issues that are involved. Refresh my memory, please.

MR. MARK: The issues are whether or not in effect a proceeding involving post-confirmation disputes between a discharged debtor, an entity called the liquidating trust, which was created as part of a plan, and third parties that are not debtors in this Court, the Bank of New York and other entities that took title to the property, whether those post-confirmation disputes are matters over which this Court has jurisdiction or over which it has exclusive jurisdiction as a core proceeding.

We have submitted that they are not, and it is not because we are not reading the same plan that you are reading, it's because the cases we have reviewed suggest that you can not simply automatically reserve jurisdiction in a broad sense to the extent that this plan does, and we have cited cases to that effect, that essentially the Bankruptcy Court's jurisdiction should not and cannot be expanded simply by provisions in a plan and in a confirmation order over these types of disputes.

I think that is really the argument in a nutshell.

THE COURT: Mr. Ziegler?

MR. ZIEGLER: Yes, sir.

THE COURT: Mr. Bublick, notice the time because I will be referring to that later.

MR. ZIEGLER: The issues as they relate to the Bank of New York and the purchasers under the plan entity, have already been brought before this Court on behalf of the debtors and their answers on the affirmative defense. they filed a crossclaim which picks up the same numbers and the same matters which was pending from the hearing last week.

The other part of the State Court complaint makes it much more obviously a core matter, because they are suits directly against Fred Stanton Smith as the liquidating trustee, and I believe individually--

MS. STETTIN: Individually.

MR. ZIEGLER: Individually and as trustee and they accuse him of negligence, breach of fiduciary duty. They seek equitable relief against him, breach of contract, and then they go into their claims against the bank.

THE COURT: Well, there is no problem with suing a trustee in State Court providing that the retention of jurisdiction is not available.

MR. ZIEGLER: But it is as to specific matters now pending before this Court that they are suing.

THE COURT: I understand, but I just make the commentary and observation that there is no prohibition

against suing a trustee in a State Court providing, of course, that the conditions that prevail at this time within the plan structure do not exist.

Okay. I will grant the motion for removal, application for removal, find that it is a core matter; deny the motion for remand, and if it is appropriate, follow the law relative to whatever you have to do for referral to the District Court.

MR. ZIEGLER: It's a report by Your Honor in the first instance.

THE COURT: Exactly, so if you would draw me that, I would appreciate it.

MR. ZIEGLER: We will do that, Your Honor.

THE COURT: Then let's consider the other motion, Motion To Dismiss Plaintiff's Complaint, For Sanctions And other Relief.

MR. MARK: Again, I think Mr. Ziegler and I have both agreed that that matter should be deferred until the District Court enters an order on the remand.

THE COURT: All right.

MR. ZIEGLER: That would probably be best.

THE COURT: Why don't you then put that as a part of the order and relative, also, I suppose to a motion to dismiss and a motion for sanctions filed by Mr. Stettin.

MR. ZIEGLER: Yes, sir. I think it would be best to deal with both of those.

THE COURT: All right. Fine. Thank you, all.

MR. MARK: Thank you.

THE COURT: You will draw the order relative to my ruling regarding the as is--no, Mr. Stettin is going to draw the as is.

MS. STETTIN: Yes, sir.

THE COURT: As to the finding of not undersecured?

MR. SALTER: Yes, sir, I will.

MR. ZIEGLER: Would you like us to draw the order on this?

THE COURT: Would you, please?

MR. ZIEGLER: Sure.


THE COURT: Thank you all. Have a nice day.

(Whereupon, the hearing
was concluded.)

CERTIFICATE

STATE OF FLORIDA)
 : SS
COUNTY OF DADE)

I, JACLYN M. OUELLETTE, Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I was authorized to and did report in shorthand the proceedings at the foregoing hearing, and that the pages, numbered from 1 through 13, inclusive, contain a full, true and complete transcription of my shorthand report of same.



WITNESS my hand and seal this 21st day of December, 1987.

/s/ Jaclyn M. Ouellette
Jaclyn M. Ouellette

My Commission Expires:
February 14, 1990.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11
CASE NOS.

84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
80-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED
PARTNERSHIP, MIAMI CENTER
CORPORATION, CHOPIN
ASSOCIATES, AND THEODORE
B. GOULD,

Debtors,

ADVERSARY
PROCEEDING
NO. 87-0546-
BKC-SMW-A

MIAMI CENTER LIMITED
PARTNERSHIP, MIAMI CENTER
CORPORATION, THEODORE B.
GOULD, CHOPIN ASSOCIATES,
HOLYWELL CORPORATION,

Plaintiffs,

Removed Circuit
Court Case No.
87-44662

vs.

BANK OF NEW YORK, CITY
NATIONAL BANK OF MIAMI, as
Trustee under Land Trust #5008793,
M.C. HOLDINGS PARTNERS, a New
York General Partnership, and its
General Partners, namely, ROBANK
CORP., H.D. LIQUIDATION INC.,
ZENTAC INVESTMENTS INC., BOTT
FLORIDA HOLDING CORP.,
AMERICAN SECURITY LTD., and M.
CENTER CORPORATION and FRED
STANTON SMITH, individually and
as Trustee of MIAMI CENTER
LIQUIDATING TRUST,

Defendants.

*MOTION TO DISMISS PLAINTIFFS' COMPLAINT,
FOR SANCTIONS AND OTHER RELIEF*

COME NOW Defendants, the Bank of New York, City National Bank of Miami, as Trustee of Land Trust #5008793, M.C. Holding Partners a New York General Partnership, and its General Partners, namely, Robank Corporation, H.D. Liquidation Inc., Zentac Investments Inc., BOTT Florida Holding Corporation, American Security Limited, and M. Center Corporation, by and through their undersigned counsel, and hereby respectfully move this Court to dismiss the Complaint filed herein in its entirety, and as grounds therefore would state:

Plaintiffs Fail To State a Cause of Action

1. In the state court from which this matter was removed, Plaintiff/Debtors filed the above-styled action for breach of fiduciary duty and for damages allegedly suffered as a result of the combined actions of Movants and Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust. While the entire Complaint is legally defective, as will hereinafter be shown, only Counts IV and V seek relief against Movants. Neither Count IV nor Count V of Plaintiffs' Complaint states a cause of action or claim upon which relief can be granted against Movants.

2. Count IV attempts to state a cause of action against Movants for breach of contract and states that Movants breached certain obligations imposed upon them "to act fairly and to engage in a good faith effort to fully comply with the terms of the Plan." This does not set forth a cause of action for breach of contract, however,

as Plaintiffs fail to allege sufficient ultimate facts establishing any liability or obligation on the part of Movants to Plaintiffs. Thus, the breach of contract count must fail.

3. Count V attempts to state a cause of action against Movant/Co-Defendant, the Bank of New York for conversion. However, Count V's allegations are vague, ambiguous and conclusory in nature, and therefore fail to allege sufficient ultimate facts establishing any liability or obligation on the part of Movant/Co-Defendant, the Bank of New York to Plaintiffs.

*Plaintiffs Are Not the Real Parties in Interest and
Are Not Authorized To Bring This Action*

4. The Plaintiffs herein are not the real parties in interest and are not authorized to bring this action, since the relief sought and the action taken can only be properly evoked by the Liquidating Trustee, who controls the Plaintiff/Debtors, but has been named as a party defendant herein.

5. The issues raised herein are duplicative of the issues raised by the Liquidating Trustee in Adversary Proceeding No. 87 - 0523-BKC-SMW-A now pending before this Court, where any issues raised here by the Debtors could be raised by them in responsive pleadings.

*This Court Has Continuing Jurisdiction To Prevent
Interference With the Plan, and Ergo, To Cause
This Action to be Dismissed*

6. As set forth in Plaintiffs' Complaint in the above-styled action, Counts, IV and V seek damages allegedly arising out of not only this Court's Order confirming the

Plan of Reorganization proposed by the Bank of New York, but also out of the Court's numerous other Orders necessitated by certain of the Plaintiffs to interpret and enforce a host of Plan provisions, not the least of which concerns administration of the Liquidating Trust.

7. Counts IV and V of Plaintiff's Complaint confront this Court with Plaintiff/Debtors who are now challenging the enforceability of certain Orders of this Court through the indirection of suing creditors participating in the Plan of Reorganization confirmed, interpreted or enforced by those very same Orders.

8. Section 1141(a) of the Code provides that the provisions of a confirmed plan "bind the debtor". Section 1142(a) of the Code directs that the debtor "*shall carry out the plan and shall comply with any orders of the court* (emphasis supplied). The maintenance of this action is therefore squarely in conflict with provisions the terms of the confirmed Plan and the Bankruptcy Code. Mr. Gould, Holywell and the other Plaintiff/Debtors have chosen to ignore Code Sections 1141 and 1142 as well as this Court's orders confirming and interpreting the Plan.

9. Plaintiff/Debtors' action is an action to prevent enforcement of certain prior Orders of this Bankruptcy Court regarding (a) interpretation of the terms of the Plan and (b) funds already disbursed in accordance with the Plan. Accordingly, the Court should exercise its continuing jurisdiction over Mr. Gould, Holywell and the other Plaintiff/Debtors by ordering them to cause this action to be dismissed.

10. The Bankruptcy Court does have the power to compel a debtor to dismiss or settle a lawsuit. *Holywell*

Corporation v. The Bank of New York, 59 B.R. 340, 351 (Bankr. S.D. Fla. 1986); *In re Texas Extrusion Corp.*, 68 Bankr. 712, 719-20 (N.D. Tex. 1986). Until an Order closing the cases is entered under Bankruptcy Rule 3022, the Bankruptcy Court retains jurisdiction to enforce Section 1142 and to prevent interference with the terms of the plan. *In re Lombard-Wall, Inc.*, 44 B.R. 928, 935 (Bankr. S.D.N.Y. 1984). After confirmation, the Bankruptcy Court retains the "authority to direct a recalcitrant *debtor or other party* to perform acts necessary to consummate the plan", under Code Section 1142(b) (emphasis supplied). *In re Harlow Properties, Inc.*, 56 B.R. 794, 798 (B.A.P. 9th Cir. 1985).

11. If the Bankruptcy Court cannot direct the parties before it to comply with the terms of the Plan as confirmed, then the Plan and Section 1142 of the Code are meaningless words. Plaintiff/Debtors are not free to contravene the confirmed Plan in separate state court proceedings, since the allowance of such action emasculates this Court and the Code.

This Action Should Be Dismissed as Moot

12. This action is moot, because Mr. Gould, Holywell, and the other Plaintiff/Debtors failed to obtain a stay of the implementation of the Plan. In the absence of such a stay, the Plan has been substantially consummated and the claims sought to be raised by Plaintiff/Debtors are moot. *Miami Center Ltd. Partnership v. The Bank of New York*, 820 F.2d 376 (11th Cir. 1987).

13. Plaintiffs have already had their days in court on these issues, and cannot reopen these matters by a

separate action filed by them in state court. Collateral estoppel, estoppel by judgment, law of the case, and *res judicata* extend to the same parties and issues, and the Plaintiffs here are unquestionably bound by the results obtained in all previous litigation before this Court, the District Court, and the Eleventh Circuit Court of Appeals.

14. A Bankruptcy Court must be able to supervise the implementation of a plan after confirmation. If debtors who dislike the confirmed Plan are free to run to state courts or to federal courts in different circuits to maintain lawsuits collaterally attacking the confirmed Plan (as Theodore Gould, the instigator herein, has attempted to do not only herein, but in no less than three (3) other state court actions where removal to the Bankruptcy Court was clearly warranted and sustained by this Court and in *Twin Development Corporation* (a wholly owned subsidiary of Debtor, Hollywell) v. *Fred Stanton Smith*, Case No. 87-0037 - C, filed in the United States District Court, Western District of Virginia, Charlottesville Division), then the bankruptcy system is for naught.

15. Movants have complied with all of their obligations under the reorganization Plan and should not have to defend themselves against disguised "multiple-bites-at-the-apple" type actions brought by Plaintiff/Debtors in other courts. This action should be dismissed as moot. To do otherwise is to promote a direct conflict between this matter and previous rulings of not only this Court but of the District Court, and the Eleventh Circuit. This Court has lived with these parties for over three years. The issues turn on a construction of the Plan confirmed by this Court and upheld all the way through the United

States Court of Appeals for the Eleventh Circuit. It is neither economical nor appropriate for this Court to re-decide those issues and it would be a clear dereliction of duty to permit the state court to do so.

Sanctions Should Be Imposed Against Plaintiffs for Filing This Action for Purposes of Interference With the Plan Rather Than Reorganization

16. "The-Bankruptcy Rules, like the Federal Rules of Civil Procedure encourage the use of sanctions to put a damper on litigation tactics that pervert the judicial system." *Cinema Service Corporation v. Edbee Corporation*, 774 F. 2d 584 (3d Cir. 1985). When the judicial process is used for purposes other than and actually antagonistic to that of reorganizing, it is abused.

17. Plaintiff/Debtors filed this action in state court *not* for the purpose of reorganizing, but for purposes of interfering with, if not undermining, the well-reasoned decisions of this Court, the District Court and Eleventh Circuit regarding the confirmed Plan. This is *not* a proper purpose and it has served to increase the costs of Movants in these consolidated Chapter 11 cases, who are *all* pursuing a common goal--that of a successful reorganization.

18. Bankruptcy Rule 9011 authorizes the payment of adversary's fees when an action is filed for improper purposes.

The Committee Note to the Bankruptcy Rule 9011 is quite terse, stating that "the last sentence of this subdivision [a] authorizes a broad range of sanctions." The text of the Rule

tracks Fed.R.Civ.P. 11, with only such modifications as are appropriate in bankruptcy matters. In providing for sanctions, Rule 9011 discourages in bankruptcy proceedings the same type of conduct which Fed.R.Civ.P. 11 proscribes. . . .

. . . Both rules provide that on violation, "the court on motion or on its own initiative *shall* impose on the person who signed [a document], the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee."

The Committee Note to Rule 11 states that *the rule is intended to reduce the reluctance of courts to impose sanctions*. "Greater attention" by the courts to "pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." The Note also emphasizes the rule's use of words such as "shall impose" to "focus the court's attention on the need to impose sanctions for pleading and motion abuses."

Id. at 586 (emphasis added).

WHEREFORE, Movants respectfully request that this Honorable Court, after consideration of this Motion to Dismiss the Plaintiff's Complaint, enter an Order: (1) granting this Motion with prejudice; (2) awarding Movants (a) the costs of bringing this Motion, (b) the costs of removing the above-styled action to this Court, and (c) such other and further relief as this Court may deem just and proper; and (3) evoking such sanctions as may be appropriate under the Bankruptcy Rules and the Federal Rules of Civil Procedure.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert A. Mark, Esq., Museum Tower, 150 West Flagler Street, Miami, Florida 33130, and upon Robert M. Musselman, Esq., 413 Seventh Street, N.E., (P.O. Box 254), Charlottesville, Virginia 22902, attorneys for Plaintiffs, and upon Theodore B. Gould, 2564-B Ivy Road, Charlottesville, Virginia 22901, appearing *pro se*, and upon Herbert Stettin, Esq., Suite 2215 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, by depositing the same in the United States mail on this 20th day of November, 1987.

Attorneys for Defendant/
Movants
The Bank of New York, et al.
Vance Salter, Esquire
COLL, DAVIDSON, CARTER,
SMITH, SALTER & BARKETT
100 Chopin Plaza
Thirty-Second Floor
Miami, Florida 33131
Tel: (305) 373-5200

and

Of counsel:

THOMAS F. NOONE,
Esquire
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York
10005
Tel: (212) 422-2974

KIRKPATRICK & LOCKHART
100 Chopin Plaza
Suite 2000
Miami Center
Miami, Florida 33131-2305
(305) 374-8112

By: /s/ S. Harvey Ziegler
S. HARVEY ZIEGLER
